Michael K. Jeanes, Clerk of Court
*** Filed ***
06/28/2011 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000180-001 DT 06/16/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Rutledge
Deputy

GREG FARSTER

GREG FARSTER
1125 N ASH ST
GILBERT AZ 85233

v.

CHARLES SESSA (001)

CHARLES SESSA
710 N 80TH PL
MESA AZ 85207

GILBERT MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. 2010CV204

Defendant Appellant Charles M. Sessa (Defendant) appeals the Gilbert Justice Court's continuation of the Injunction Against Harassment. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On April 6, 2010, Plaintiff Greg R. Farster requested an injunction against harassment on behalf of himself, his wife, and his daughter,[1] claiming acts of telephone harassment. The trial court granted the injunction against the Defendant on an *ex parte* basis.

Defendant requested a hearing on the Injunction on July 27, 2010, and the court set the matter for on August 10, 2010.[2] At the hearing, Plaintiff testified about numerous telephone calls from Defendant.[3] He stated Defendant would call at unreasonable hours.[4] In contrast, Defendant

[1] Krista Farster, Plaintiff's daughter, filed her own request for an Injunction Against Harassment in Maricopa County Superior Court, CV 2010–092521. This matter was later dismissed when Plaintiff failed to appear at the hearing on the Injunction.
[2] Audio recording of August 10, 2010, bench trial.
[3] *Id*. at 3:29:52 and 3:30:15.
[4] *Id*. at 3:31–3:32. Defendant testified to telephone calls at 2:30 A.M. and 4:00 A.M.

testified Plaintiff's daughter had been harassing him and he was the victim.[5] Defendant also stated he knew "I can't have anything to do with her because she said in open court she doesn't want anything to do with me."[6] The trial court reviewed the telephone records[7] and upheld the injunction.

Defendant filed a timely notice of appeal. He requested the Court quash or dismiss the order as no police were involved. Defendant further maintained (1) he wanted to be able to send Christmas gifts to Krista, her aunts and her mom;[8] (2) any harassment was to him; and (3) "Phone calls excessive because Kristas [sic] father had her calls blocked from me."[9] Defendant alleged in his Notice of Appeal "reason for excessive calls was the Father Greg Farster had handset blocked would not ring [sic]."[10] Plaintiff failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did the Defendant Properly Present His Issues on Appeal.

Defendant submits an appeal challenging the sufficiency of the evidence, but does not reference the record, or cite any relevant legal authority. Therefore, Defendant's appellate memorandum fails to comply with Rule 8(a) (3), Super. Ct. R. App. P.—Civ., which states:

> Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

Defendant contests the trial court's continuation of the injunction. However, he fails to provide any legal authority to support his position. Defendant also neglects to specifically reference the record in his brief. For this reason, the Court finds the Defendant failed to properly present his issues for appeal.

It is not enough to merely mention an argument. Briefs must present significant arguments supported by authority that set forth the appellant's position on the issues raised. Failure to argue a claim usually equates with abandonment and waiver of the claim. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). The Court is not required to become the advocate for the litigant and search the records and exhibits to substantiate a party's claims. *Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (Ct. App. 1984). Furthermore, unless

[5] *Id*. at 4:12:27.
[6] *Id*. at 4:15.
[7] Plaintiff's Exhibit 1
[8] Defendant's Memorandum and Motion to Quash Order of Harassment dated Nov. 22, 2010. This is the only appellate memo filed.
[9] *Id.*
[10] *Id.*; *See also* Defendant's Notice of Appeal 10 CV 204 dated August 11, 2010.

there is fundamental error, allegations that lack specificity or reference to the record do not warrant consideration on appeal. *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977). Fundamental error rarely exists in civil cases. *See Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, 118 P.3d 37, ¶ 23 (App. 2005). *See also Bradshaw v. State Farm Mutual Automobile Ins. Co.*, 157 Ariz. 411, 420 758 P.2d 1313, 1322 (1988) (doctrine of fundamental error in civil cases may be limited to those instances when a party was deprived of a constitutional right). The Court finds no fundamental error in this record.

To the extent the Defendant is challenging the sufficiency of the evidence, this Court has carefully considered the record. Based on the evidence presented at trial, any reasonable trier of fact could have concluded Defendant was responsible for the charged offense.

B. Did the Trial Court Err by Continuing the Injunction Against Harassment.

Defendant admits the allegations in both his Memorandum and Notice of Appeal. In both instances, he explains his reason for the repetitive telephone calls. Defendant states he repeatedly called because Plaintiff blocked his phone. Defendant's reason, however, does not justify his actions. Repeated telephone calls are annoying and specifically prohibited. Plaintiff is not required to provide or allow telephone access. Plaintiff is free to block callers from accessing his phone and disturbing Plaintiff's peace and tranquility. Defendant does not have the unilateral right to determine that Plaintiff must allow or receive telephone contact. A.R.S. § 13–2916 states:

> **A.** It is unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to use a telephone and use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict physical harm to the person or property of any person. It is also unlawful to otherwise disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any person at the place where the telephone call or calls were received.
>
> **B.** Any offense committed by use of a telephone as set forth in this section is deemed to have been committed at either the place where the telephone call or calls originated or at the place where the telephone call or calls were received.
>
> **C.** Any person who violates this section is guilty of a class 1 misdemeanor.

The trial court reviewed Plaintiff's Exhibit 1 and noted the number of telephone calls. Many of the calls were made within minutes of each other. The trial court concluded the calls were excessive and harassing.

Appellate courts do not re-weigh the evidence to see if the appellate court would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d

1185, 1189 (1989). Instead, the appellate court is limited to determining if the Plaintiff presented sufficient evidence to prove the case by a preponderance of the evidence. In addressing the question of sufficiency of the evidence, the Arizona Supreme Court said the following:

> We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

State v. Bearup, 221 Ariz. 163, 211 P.3d 684 ¶ 16 (2009) (citations omitted). In this case, the trial court was presented with conflicting evidence. Plaintiff and his daughter testified about the harassing nature of the telephone contact. Defendant contradicted these assertions and claimed (1) he was the victim and (2) he had not made harassing phone calls. The evidence is conflicting. The Arizona Supreme Court said the following about reviewing conflicting evidence and testimony:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Here, the trial court found the Plaintiff's evidence to be more credible. The trial court gave its reason for finding the Plaintiff's evidence to be more credible and ruled Defendant's conduct appeared to be obsessive.[11] Because the issue in the present case requires an "assessment of conflicting procedural, factual or equitable considerations which vary from case to case" rather than a question of "law or logic," it is not appropriate for this Court to substitute "its judgment for that of the trial judge." This Court concludes the trial court correctly resolved this case.

[11] Interestingly, at the hearing Defendant stated he knew he could have no contact with Plaintiff's daughter "because she said in open court she doesn't want anything to do with me,"but alleged his desire to provide a Christmas gift for her as one of his reasons for the appeal.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Gilbert Municipal Court did not err in upholding the Injunction Against Harassment.

IT IS THEREFORE ORDERED affirming the judgment of the Gilbert Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Gilbert Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
JUDICIAL OFFICER OF THE SUPERIOR COURT 062120111130